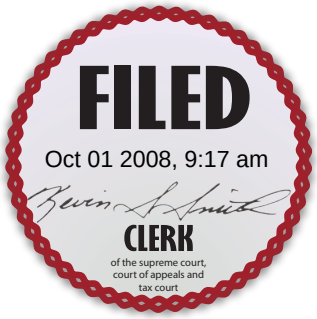

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT BRANTLEY, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No.71A03-0804-PC-165
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D04-0311-PC-37

October 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following his conviction for Class B felony burglary, Robert Brantley, Jr., appeals the denial of his petition for post-conviction relief. Specifically, he contends that his trial counsel was ineffective for failing to request a jury instruction requiring the exclusion of "every reasonable hypothesis of innocence" because the evidence against him was entirely circumstantial and that his appellate counsel was ineffective for failing to argue that the trial court should have further instructed the jury following a question during deliberations. Although the evidence against Brantley is entirely circumstantial and he was therefore entitled to such an instruction, because the evidence against Brantley is also overwhelming, he cannot show prejudice. His trial counsel ineffectiveness claim thus fails. As for appellate counsel ineffectiveness, because trial counsel initially acquiesced to the trial court's instruction to the jury and only later changed his mind and because trial counsel's proposed instruction to the jury was not a correct statement of the law, appellate counsel was not ineffective for failing to raise this non-meritorious issue on direct appeal. We therefore affirm the post-conviction court.

Facts and Procedural History

In the early morning hours of October 15, 1996, Brenda and Miguel Gonzales were sleeping in the basement bedroom of their South Bend home. The doors to their home were locked, but the basement window was open and covered with a screen. Miguel was awakened by a sound and said, "[W]ho's there?" Trial Tr. p. 137. Hearing no response, Miguel went back to sleep. A few minutes later, Brenda woke up to check the time, but the clock was not in its usual location. So, Brenda got out of bed and turned

on the light. Looking around the room, Brenda noticed that the clock was on the floor and the cable box was disconnected from the television. Brenda was about to return to bed when Miguel asked her if the basement door was shut. Brenda observed that the door was open; however, Brenda remembered shutting the door before going to bed. Miguel then asked Brenda if the back door was shut. Brenda observed that that door was open, too. Brenda also recalled shutting and locking that door before going to bed. Brenda then ran up the stairs to the back door and saw "two black guys walking from back behind the garage towards the property." *Id.* at 110. While the men were "[w]alking towards the house," Brenda asked them, "[W]hat do you want? What are you doing here?" *Id.* at 114. The men stopped, and one of them said, "[N]othing." *Id.* The men turned and walked behind the garage.

Brenda then went back inside the house. By this time, Miguel had come upstairs with a machete. Miguel and Brenda walked behind the garage and saw the two men putting on jackets. The man Brenda and Miguel later identified as Brantley was putting on a Chicago Bulls jacket, and the other man was putting on a pullover jacket. Miguel asked them what they were doing in his house, and Brantley replied that they had not been in his house and that Miguel should "get away," "shut up," or "he'd kill him." *Id.* at 116, 139. Miguel and Brenda returned to their house. Brenda observed the men exit the alley at Main Street, cross Main Street, and go "north towards Ewing." *Id.* at 118. In the meantime, the police had been called, and Miguel and Brenda waited inside for their arrival.

One officer arrived at the Gonzales home minutes later while another officer patrolled the neighboring area. The police determined that the screen to the basement window had been cut with a knife. Brantley, who was wearing a Bulls jacket, was stopped on Ewing Street about three blocks north of the Gonzales home in a bank parking lot. A knife was found in his pocket. A second man in a pullover jacket was stopped nearby. A canine unit was called to the Gonzales home, and a dog found Brenda's purse, which she had kept by her bed, emptied on the ground in the alley. Some dollar bills were missing from the purse. The dog also found a dollar bill in the grassy area between Main Street and the sidewalk near the Gonzales home. After the dog found the purse, it alerted to the scent on the purse, "took off," and "pulling . . . real hard" led the officer out of the alley, across Main Street, across a field, and to the parking lot where other officers had already detained Brantley. *Id.* at 197, 196. Brenda and Miguel were taken to the bank parking lot, and both of them identified Brantley as the man who had been on their property.

The State charged Brantley with Class B felony burglary and also alleged that he was a habitual offender. Following a jury trial, the jury found Brantley guilty as charged and also found that he was a habitual offender. The trial court sentenced him to thirty-two years imprisonment.

On direct appeal, Brantley argued that the evidence was insufficient to support his conviction for burglary because there was no evidence to prove that he was inside the Gonzales home or connected to any items reported stolen. This Court held that contrary to Brantley's assertions, a burglary conviction may withstand a sufficiency challenge

even when no one actually sees a defendant enter the victim's home and stolen property is not found in the defendant's possession. *Brantley v. State*, No. 71A03-9711-CR-398 (Ind. Ct. App. Aug. 31, 1998), slip op. at 3. In addition, we noted that a burglary conviction may be sustained by circumstantial evidence alone. *Id.* at 4. Observing that the basement window screen had been cut and pulled open, Brenda's purse had been taken from beside her bed, emptied of its contents, and left in the alley, currency was missing from her purse, Brenda and Miguel saw Brantley both on their property and in the alley, the police dog tracked the scent on Brenda's purse to where Brantley had been stopped by the police, a dollar bill was found on the path Brenda indicated the men had taken upon exiting the alley, and a knife was found on Brantley's person, we affirmed Brantley's burglary conviction. *Id.*

Brantley filed a petition for post-conviction relief in 2003, which was amended in 2007. Following a hearing, the post-conviction court entered findings of fact and conclusions of law denying relief. Brantley now appeals.

Discussion and Decision

Brantley contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that

reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "'[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.'" *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*).

On appeal, Brantley alleges both trial and appellate counsel ineffectiveness. We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied.* A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

I. Trial Counsel

Brantley first argues that his trial counsel was ineffective for failing to request a jury instruction requiring the exclusion of "every reasonable hypothesis of innocence" when the evidence is entirely circumstantial. We agree with Brantley that when a case

rests entirely upon circumstantial evidence, a defendant is entitled to such an instruction. *See Lloyd v. State*, 669 N.E.2d 980, 985 (Ind. 1996); *see also Myers v. State*, 532 N.E.2d 1158, 1159 (Ind. 1989). However, when a case involves direct evidence, a defendant is not entitled to such an instruction. *Lloyd*, 669 N.E.2d at 985.

Here, the issue is whether Brantley's burglary conviction rests entirely upon circumstantial evidence. In order to convict Brantley of burglary as charged in this case, the State had to prove that he broke and entered the Gonzales home with intent to commit theft. Ind. Code § 35-43-2-1(1)(B)(i). The State argues that although the State relied upon circumstantial evidence to prove that someone broke and entered the Gonzales home, it used direct evidence to prove Brantley's identity. Therefore, the State's argument continues, the reasonable hypothesis of innocence instruction was not available and trial counsel could not have been ineffective for failing to request it. The State asserts the following evidence constitutes direct evidence: after Brenda and Miguel were awakened by a noise inside their home and Brenda went to the back door, she saw Brantley, on their property, walking toward their house; when Brenda and Miguel, who was wielding a machete, followed the men behind their detached garage, Brantley said, "get away," "shut up," or "he'd kill him," Trial Tr. p. 116, 139; and the police canine followed the scent on Brenda's purse to the bank parking lot where the police had already detained Brantley.

Direct evidence is defined as evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption. *Davenport v. State*, 749 N.E.2d 1144, 1150 (Ind. 2001), *reh'g denied*. By contrast, "circumstantial

evidence immediately establishes collateral facts from which the main fact may be inferred." *Nichols v. State*, 591 N.E.2d 134, 136 (Ind. 1992). "In cases based solely on circumstantial evidence, there are generally no witnesses to the alleged crime." *Davenport*, 749 N.E.2d at 1150.

Contrary to the State's assertion, there is no direct evidence in this case that Brantley actually broke and entered the Gonzales home. Neither Brenda nor Miguel saw Brantley inside their home or saw Brantley in the process of breaking and entering their home. Rather, this is a textbook circumstantial evidence case. That is, inferences have to be made from collateral facts to establish the fact that Brantley broke and entered the Gonzales home. We addressed a similar factual pattern in *McDonald v. State*, 547 N.E.2d 294 (Ind. Ct. App. 1989), although it was not a post-conviction case, and came to the same conclusion.

In *McDonald*, a police officer went to an elementary school in response to its alarm system. When the officer arrived, he saw a car parked near the school. The hood of the car was still warm. After running a check on the license plate number, the officer saw McDonald walking away from the school toward the parked car. During a pat down search of McDonald, the officer found a screwdriver, a pry bar, a pair of scissors, and an audio jack. It was later determined that there was an open window in the school's music room; pry marks on the window matched McDonald's pry bar. In addition, the scissors found on McDonald were identified as belonging to the school. We concluded that this evidence was circumstantial and that McDonald was entitled to an instruction on the

"exclusion of every hypothesis of innocence." *Id.* at 297. We therefore reversed McDonald's conviction and remanded the case. *Id.*

Because Brantley's case was based entirely upon circumstantial evidence, he was entitled to an instruction requiring the exclusion of "every reasonable hypothesis of innocence." Accordingly, trial counsel was deficient for failing to request one. However, the question becomes whether Brantley suffered prejudice. The post-conviction court found that he did not: "Given the volume of evidence presented, there is no reasonable possibility that the giving of the instruction would have affected the jury's verdict. This court's confidence in the outcome of the jury's decision has not been undermined by any deficiency there might have been in counsel's performance." Appellant's App. p. 113 (citation omitted). We agree with the post-conviction court.

Even though the evidence against Brantley is entirely circumstantial, it is overwhelming. According to Miguel, less than five minutes after he was awakened by a noise in their bedroom and items were found misplaced, Brenda observed Brantley on their property walking toward their house. Trial Tr. p. 146. After Brenda inquired about Brantley's middle-of-the-night presence, Brantley turned and walked behind the garage. Miguel equipped himself with a machete, and he and Brenda walked behind their garage. Brantley then threatened to kill Miguel if he did not keep quiet. Brenda's purse, which was missing dollar bills, was later found in the alley by the garage, and a police canine tracked the scent from Brenda's purse to where the police had already apprehended Brantley. Along the path, the dog found a dollar bill. In addition, it was determined that the Gonzales home had been broken into by cutting the screen in the basement bedroom

window, and a knife was found on Brantley's person at the time of his apprehension. Brantley has failed to demonstrate that there is a reasonable probability that, but for trial counsel's failure to request the instruction, the result of his trial would have been different.

II. Appellate Counsel

Brantley next argues that his appellate counsel was ineffective for failing to argue that the trial court should have further instructed the jury following a question during deliberations. Appellate courts should be particularly deferential to an appellate counsel's strategic decision to include or exclude issues, unless the decision was "unquestionably unreasonable." *Bieghler*, 690 N.E.2d at 194. To prevail on his claim of ineffective assistance of appellate counsel, Brantley must show that his appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *See Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002), *reh'g denied*. Appellate counsel is not deficient if the decision to present some issues rather than others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made. *Id.* Even if counsel's choice is not reasonable, to prevail, the petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. *Id.*

During deliberations in this case, the jury submitted the following written question to the trial court, "Does breaking and entering mean the physical act or does the definition include the knowledge and approval of the act?" Trial Tr. p. 67, 214. With the parties' agreement, the court submitted the following written response to the jury, "The

jury must rely upon the Court's written instructions." *Id.* at 67. Sometime after the jury returned to its deliberations, Brantley's attorney withdrew his acquiescence to the court's instruction to the jury and asked for a substitute instruction. *Id.* at 215-18. Specifically, trial counsel asked for the following instruction to be given to the jury:

> Knowledge of a crime is not the basis for culpability, knowledge alone is not the basis for culpability under any theory, knowledge and approval, depending on how the approval was given, might be culpability under conspiracy with which the defendant is not charged, and under aiding and abetting or as an accomplice, the defendant is not charged as an accomplice. *In order for the State to try him on that basis, he must be so charged.*

Id. at 216 (emphasis added). Trial counsel cited *Kimble v. State*, 659 N.E.2d 182 (Ind. Ct. App. 1995), *trans. denied*, as authority. *Id.*

Despite trial counsel's proposed instruction, it is clear that "[a] defendant may be charged as a principal and convicted on evidence that he aided in the commission of the crime." *Johnson v. State*, 518 N.E.2d 1073, 1077 (Ind. 1988); *see also Whitener v. State*, 696 N.E.2d 40, 44 (Ind. 1998) ("[A]lthough it has become common practice to put the defendant on notice that he is being charged under the aiding and inducing statute, a defendant may be convicted on evidence of aiding or inducing even though the State charged the defendant as the principal."). Because trial counsel initially acquiesced to the court's instruction to the jury to refer to the court's written instructions (and, in fact, the jury already returned to its deliberations before trial counsel changed his mind) and because counsel's proposed instruction was *not* a correct statement of the law, appellate counsel was not ineffective for failing to raise this non-meritorious issue on direct appeal. We therefore affirm the post-conviction court.

Affirmed.

KIRSCH, J., and CRONE, J., concur.